Supreme Court, U.S.
FILED

No. 10- 10-615 SEP 28 2010

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

LUXPRO CORPORATION,

Petitioner,

v.

APPLE INC.,
FORMERLY KNOWN AS APPLE COMPUTER, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

RICHARD A. ADAMS
PHILLIP N. COCKRELL
REID D. MILLER
COREY D. MCGAHA
JEREMY Y. HUTCHINSON
PATTON ROBERTS PLLC
Wells Fargo Plaza
Suite 400
2900 St. Michael Drive
Texarkana, Texas 75503
(903) 334-7000

PATRICK J. CONROY
Counsel of Record
THERESA M. DAWSON
SHORE CHAN BRAGALONE
DEPUMPO LLP
901 Main Street, Ste. 3300
Dallas, Texas 75202
(214) 593-9110
pconroy@shorechan.com

Attorneys for Petitioner
Luxpro Corporation

232398

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Extraordinary times call for extraordinary measures—ordinary times do not. In spite of the availability of other avenues of appellate review, including direct appeal, the U.S. District Court for the Western District of Arkansas's ("District Court") careful and reasoned analysis of each of the relevant venue transfer factors, and Apple, Inc.'s ("Apple") nearly two-month delay in requesting mandamus relief, a majority panel of the Eighth Circuit Court of Appeals granted a writ of mandamus and directed the District Court to transfer the underlying case to the U.S. District Court for the Northern District of California ("Northern District of California"). The Eighth Circuit majority panel's decision ignores the discretion expressly authorized to a district court under 28 U.S.C. § 1404(a) and improperly carves out a new subsection to 28 U.S.C. § 1292. Notwithstanding, because none of the three factors set forth in *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367 (2004) (the "*Cheney* factors"), were met, the Eighth Circuit majority panel's grant of such extraordinary relief was, in itself, an abuse of discretion.

The question presented is: Does the All Writs Act authorize a court of appeals to conduct an interlocutory review of a district court's order denying a § 1404(a) venue transfer motion when (i) the petitioner had multiple available options to obtain review of that order; (ii) the district court had statutory authority to deny the motion and entered a reasoned decision that was based upon a consideration of factors of which the circuit court of appeals has approved; and (iii) mandamus relief is unreasonable under the circumstances because, *inter alia*, the petitioner waited nearly two months to request mandamus relief?

RULE 29.6 STATEMENT

Luxpro Corporation ("Luxpro") is a privately-held company. It has no parent and no publicly-held company owns 10% or more of the company's stock.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
RULE 29.6 STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF APPENDICES	vi
TABLE OF CITED AUTHORITIES	vii
ORDERS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
I. APPLE'S MOTION TO TRANSFER	2
II.APPLE'S PETITION FOR WRIT OF MANDAMUS	5
REASON FOR GRANTING THE PETITION	5
I. CERTIORARI IS WARRANTED BECAUSE THE EIGHTH CIRCUIT MAJORITY PANEL'S RULING CONFLICTS WITH *CHENEY*	8

Table of Contents

Page

A. THE FIRST *CHENEY* FACTOR WAS NOT MET: APPLE HAD OTHER AVAILABLE OPTIONS, INCLUDING A DIRECT APPEAL, FOR SEEKING REVIEW OF THE DISTRICT COURT'S MOTION TO TRANSFER ORDER. 9

1. A Direct Appeal Is Available And Not Precluded By 28 U.S.C. § 1294(1). .. 10

B. THE SECOND *CHENEY* FACTOR WAS NOT MET: APPLE'S RIGHT TO A WRIT IS NOT CLEAR AND INDISPUTABLE. 13

1. The District Court Was Authorized to Deny Apple's Motion. 14

2. Luxpro's Choice of Forum is Entitled to Deference. 16

3. The Record Supports The District Court's Decision To Deny Apple's Motion To Transfer. 17

C. THE THIRD *CHENEY* FACTOR WAS NOT MET: MANDAMUS RELIEF IS INAPPROPRIATE. 18

Table of Contents

	Page
II. THE CIRCUIT COURTS OF APPEALS ARE SPLIT OVER THE SCOPE AND STANDARD OF MANDAMUS REVIEW AVAILABLE FOR § 1404(A) VENUE ORDERS.	20
III. THE SUPREME COURT HAS YET TO DIRECTLY ADDRESS THE LAW CONCERNING THE AVAILABILITY OF MANDAMUS RELIEF FOR DENIED VENUE TRANSFER MOTIONS.	23
CONCLUSION	24

TABLE OF APPENDICES

Page

APPENDIX A — EIGHTH CIRCUIT COURT ORDER FILED APRIL 19, 2010 ..... 1a

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF ARKANSAS, TEXARKANA DIVISION DATED SEPTEMBER 28, 2009 ..... 14a

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DATED JUNE 30, 2010 ..... 21a

TABLE OF CITED AUTHORITIES

Page

CASES

Allied Chem. Corp. v. Daiflon, Inc.,
449 U.S. 33 (1980) 14

Astro-Med, Inc. v. Nihon Kohden Am., Inc.,
591 F.3d 1 (1st Cir. 2009) 12

Bankers Life & Cas. Co. v. Holland,
346 U.S. 379 (1953) ..... *passim*

Bank of Columbia v. Sweeny,
26 U.S. 567 (1828) 8

Brock v. Entre Computer Ctrs., Inc.,
933 F.2d 1253 (4th Cir. 1991) 11, 20

Broussard v. State Farm Fire & Cas. Co.,
523 F.3d 618 (5th Cir. 2008) 12

Caleshu v. Wangelin,
549 F.2d 93 (8th Cir. 1977) 9

Carr v. Donohoe,
201 F.2d 426 (8th Cir. 1953) 12, 13

Cheney v. U.S. Dist. Court for D.C.,
542 U.S. 367 (2004) ..... *passim*

De Beers Consol. Mines, Ltd. v. U.S.,
325 U.S. 212 (1945) 6, 14

Cited Authorities

Page

Haig v. Agee,
453 U.S. 280 (1981). 15

Ill. Tool Works, Inc. v. Sweetheart Plastics, Inc.,
436 F.2d 1180 (7th Cir. 1971) 11, 20

In re Federal-Mogul Global, Inc.,
300 F.3d 368 (3d Cir. 2002) 21

In re Genentech, Inc.,
566 F.3d 1338 (Fed. Cir. 2009) 7

In re Hoffman-La Roche Inc.,
587 F.3d 1333 (Fed. Cir. 2009) 7

In re Horseshoe Entm't,
337 F.3d 429 (5th Cir. 2003) 16

In re Nat'l Presto Indus., Inc.,
347 F.3d 662 (7th Cir. 2003) 22

In re Nintendo Co., Ltd.,
589 F.3d 1194 (Fed. Cir. 2009) 7

In re TS Tech USA Corp.,
551 F.3d 1315 (Fed. Cir. 2008) 7

In re Volkswagen of Am., Inc.,
545 F.3d 304 (5th Cir. 2008), *cert. denied*,
129 S.Ct. 1336 (2009) ..... *passim*

Cited Authorities

	Page
In re Volkswagen of Am., Inc., 566 F.3d 1349 (Fed. Cir. 2009)	7
In re Zimmer Holdings, Inc., 609 F.3d 1378 (Fed. Cir. 2010)	7
Jama v. Immigration & Customs Enforcement, 543 U.S. 335 (2005)	14-15
Kasey v. Molybdenum Corp. of Am., 408 F.2d 16 (9th Cir. 1969)	22
Kerr v. U.S. Dist. Court for the N. Dist. of Cal., 426 U.S. 394 (1976)	6
La Buy v. Howes Leather Co., 352 U.S. 249 (1957)	23
Maine v. Taylor, 477 U.S. 131 (1986)	17
McGraw-Edison Co. v. Van Pelt, 350 F.2d 361 (8th Cir. 1965)	13
Moses v. Bus. Card Express, Inc., 929 F.2d 1131 (6th Cir. 1991)	11, 20
N.Y. Marine & Gen. Ins. Co. v. Lafarge N. Am., Inc., 599 F.3d 102 (2d Cir. 2010)	12

Page

Plum Tree, Inc. v. Stockment,
488 F.2d 754 (3d Cir. 1973) 12

Reyes v. Supervisor of the DEA,
834 F.2d 1093 (1st Cir. 1987) 11, 20

Roofing & Sheet Metal Servs., Inc. v. La Quinta Motor Inns, Inc.,
689 F.2d 982 (11th Cir. 1982) 11, 20

SongByrd, Inc. v. Estate of Grossman,
206 F.3d 172 (2d Cir. 2000) 11

Starnes v. McGuire,
512 F.2d 918 (D.C. Cir. 1974) (en banc) 11, 20

TEC Floor Corp. v. Wal-Mart Stores, Inc.,
4 F.3d 599 (8th Cir. 1993) 11, 20

TechnoSteel, LLC v. Beers Const. Co.,
271 F.3d 151 (4th Cir. 2001) 11

Terra Int'l, Inc. v. Miss. Chem. Corp,
119 F.3d 688 (8th Cir. 1997) 16-17, 19

Will v. United States,
389 U.S. 90 (1967) 5, 6, 8

Zomba Enters., Inc. v. Panorama Records, Inc.,
491 F.3d 574 (6th Cir. 2007) 12

Cited Authorities

Page

STATUTES

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1292 ..... *passim*

28 U.S.C. § 1294(1) 9, 10, 13, 23

28 U.S.C. § 1391 ..... 3, 15, 16

28 U.S.C. § 1404(a) ..... *passim*

28 U.S.C. § 1406(a) 9

28 U.S.C. § 1651(a). ..... *passim*

FED. R. APP. P. 4(a) 20

FED. R. CIV. P. 61 10

SUP. CT. R. 10 ..... 8, 22, 24

ORDERS BELOW

On September 28, 2009, the District Court denied Apple's § 1404(a) motion. (Appendix B). On April 19, 2010, a majority panel of the Eighth Circuit granted Apple's petition for writ of mandamus ("Petition").[1] (Appendix A). On June 30, 2010, the Eighth Circuit denied Luxpro's petition for rehearing en banc,[2] (Appendix C), and, on July 7, 2010, it issued a mandate directing the District Court to transfer the case to the Northern District of California.

JURISDICTION

The Eighth Circuit's decision denying en banc review was entered on June 30, 2010. (Appendix C). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant portion of Section 1651, Title 28, United States Code, provides:

> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

28 U.S.C. § 1651(a).

---

1. Judge Kermit E. Bye indicated that he would deny the Petition.

2. Judge Bye indicated that he would grant the petition for rehearing en banc, and Judge Bobby E. Shepherd took no part in the consideration or decision of the matter.

The relevant portion of Section 1404, Title 28, United States Code, provides:

> (a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

28 U.S.C. § 1404(a).

STATEMENT OF THE CASE

On October 14, 2008, Luxpro,[3] a privately-held consumer electronics corporation with its headquarters in Taipei City, Taiwan, filed a complaint in the Western District of Arkansas against Apple, a publicly-traded multinational corporation headquartered in California. Luxpro asserted claims of, *inter alia*, tortious interference with a contract, unfair competition, and attempted common-law monopolization.

I. APPLE'S MOTION TO TRANSFER

On December 19, 2008, Apple filed a motion to transfer the litigation to the Northern District of California, pursuant to § 1404(a) ("Motion to Transfer"). Apple claimed that a transfer to California was warranted, in large part, merely because Apple was headquartered there. Apple also stated, albeit conclusorily, that relevant witnesses and documents were located in California. It further purported that a

3. Both Luxpro and Apple develop, manufacture, and distribute MP3 players worldwide.

transfer would be more convenient for Luxpro. Notably, although it had not previously challenged venue as being improper under 28 U.S.C. § 1391, Apple stated that Luxpro's choice of venue was entitled to no deference because there were "no connections to the chosen forum."

To support its Motion to Transfer, Apple submitted a written declaration which: (1) stated that "the overwhelming majority of documents relevant to Luxpro's claims are located at Apple's headquarters in Cupertino, California" and (2) identified 10 employee "witnesses" who allegedly resided in California and "possess[ed] information relevant to Luxpro's claims."

Luxpro presented evidence of the following: (1) Luxpro chose to file its case in the Western District of Arkansas based upon that forum's short time-to-trial from the date of the filing of a lawsuit; (2) the Western District of Arkansas was convenient for Luxpro's witnesses, who agreed to be present there for both depositions and trial testimony; (3) and Luxpro's documents relevant to the lawsuit were in the possession of its trial counsel in Texarkana, Arkansas. To further demonstrate that the Western District of Arkansas was centrally located and thus more convenient overall, Luxpro identified 26 non-party witnesses located around the world.

The District Court rejected Apple's assertion that Luxpro's choice of forum was entitled to no deference, stating: "[t]he Court will not disregard the deference provided Luxpro because it brought its claim in a forum that was not its residence nor the place where the

conduct occurred when a U.S. forum with those two connections does not exist." (Appendix B at 3). Notably, the District Court expressly found that the "only connection to California is that Apple is headquartered there. Therefore, Luxpro did not choose the Western District of Arkansas in spite of the existence of a district with substantial connections to the dispute." (*Id.* at 4).

Although the District Court found that the Northern District of California would be more convenient for the parties and some of the nonparty witnesses, it nevertheless concluded that, because the majority of witnesses were international, neither the ability to subpoena witnesses nor the location of the witnesses favored transfer. (*Id.*). The District Court recognized that no venue was more convenient for the place where the alleged wrongs occurred. (*Id.*). However, it found that judicial economy weighed in favor of denial of Apple's Motion to Transfer because both the median time-to-trial and the median-time-to-disposition were longer in the Northern District of California. (*Id.* at 4-5).

In the end, the District Court denied Apple's Motion to Transfer because Apple failed to meet its burden of proof that a transfer was warranted:

> The Court has considered all arguments presented regarding the transfer of this case and finds that Apple has not met its burden of proving that a transfer is warranted here. Apple has shown the Court that the only convenience factor that definitely favors the Northern District of California is that it would be easier for the parties and some of the

> nonparty witnesses to travel to San Francisco, California rather than Texarkana, Arkansas. In this modern day of travel conveniences, this alone does not convince the Court that a transfer is warranted for convenience purposes. Additionally, there is nothing here that indicates that the interest of justice cannot properly be served in the Western District of Arkansas. Therefore, Apple's Motion to Transfer is DENIED.

(*Id.* at 5).

II. APPLE'S PETITION FOR WRIT OF MANDAMUS

Nearly two months after the District Court denied its Motion to Transfer, Apple petitioned the Eighth Circuit for a writ of mandamus. A majority panel of the Eighth Circuit granted Apple's Petition. (Appendix A). On June 30, 2010, the Eighth Circuit denied Luxpro's petition for rehearing en banc (Appendix C), and, on July 7, 2010, it issued a mandate directing the District Court to transfer the case to the Northern District of California.

REASON FOR GRANTING THE PETITION

"Courts faced with petitions for the peremptory writs must be careful lest they suffer themselves to be misled by labels such as 'abuse of discretion' and 'want of power' into interlocutory review of nonappealable orders on the mere ground that they may be erroneous." *Will v. United States*, 389 U.S. 90, 99 n.6 (1967). "Certainly Congress knew that some interlocutory

orders might be erroneous when it chose to make them non-reviewable." *De Beers Consol. Mines, Ltd. v. U.S.*, 325 U.S. 212, 225 (1945) (dissenting opinion of Mr. Justice Douglas). "A judicial readiness to issue the writ of mandamus in anything less than an extraordinary situation would run the real risk of defeating the very policies [*i.e.*, discouraging piecemeal litigation] sought to be furthered by [the] judgment of Congress." *Kerr v. U.S. Dist. Court for the N. Dist. of Cal.*, 426 U.S. 394, 403 (1976).

The writ of mandamus "has traditionally been used in the federal courts only 'to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.'" *See Will*, 389 U.S. at 95 (citation omitted). As such, only "exceptional circumstances amounting to a judicial 'usurpation of power'" will justify issuance of the writ. *See id.* (citation omitted).

Based upon these principles, this Court, in *Cheney*, set forth three requirements that must be satisfied before a writ of mandamus may issue: (1) "the party seeking issuance of the writ must have no other adequate means to attain the relief he desires"; (2) "the petitioner must satisfy the burden of showing that his right to issuance of the writ is clear and indisputable"; and (3) "even if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances." *Cheney* 542 U.S. at 380-81 (brackets and quotations omitted).

The Eighth Circuit majority panel's decision to grant mandamus relief in a situation that is far from

"extraordinary," and which does not meet each of the three *Cheney* factors, guarantees that parties will petition circuit courts of appeals for mandamus relief on any adverse ruling entered against it during the course of litigation—regardless of whether the appeal is authorized under § 1292, which is precisely the use against which this Court has warned. *C.f. Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 382-83 (1953) ("If we applied the reasoning advanced by the petitioner, then every interlocutory order which is wrong might be reviewed under the All Writs Act.").

Notably, "extraordinary" mandamus relief has become "ordinary," and even commonplace, in the Federal Circuit in the wake *In re Volkswagen of Am., Inc.* ("*Volkswagen I*"), 545 F.3d 304 (5th Cir. 2008), *cert. denied*, 129 S.Ct. 1336 (2009), because the Fifth Circuit set a standard akin to that set by the Eighth Circuit majority panel in this case. Since *Volkswagen I*, mandamus is being used as a substitute for an interlocutory appeal, and venue transfer orders are being reviewed under a mere erroneous standard of review—a much lower standard of review than would be accorded on direct appeal.[4]

"But the extraordinary writs do not reach to such cases; they may not be used to thwart the congressional policy against piecemeal appeals. Mandamus, it must

4. *See, e.g., In re Zimmer Holdings, Inc.*, 609 F.3d 1378 (Fed. Cir. 2010); *In re Nintendo Co., Ltd.*, 589 F.3d 1194 (Fed. Cir. 2009); *In re Hoffman-La Roche Inc.*, 587 F.3d 1333 (Fed. Cir. 2009); *In re Genentech, Inc.*, 566 F.3d 1338 (Fed. Cir. 2009); *In re TS Tech USA Corp.*, 551 F.3d 1315 (Fed. Cir. 2008); *In re Volkswagen of Am., Inc.* ("*Volkswagen II*"), 566 F.3d 1349 (Fed. Cir. 2009).

be remembered, does not run the gauntlet of reversible errors." *Will*, 389 U.S. at 104 (quotation and brackets omitted). In other words, mandamus must not devolve into "interlocutory review of nonappealable orders on the mere ground that they may be erroneous." *Id. at* 98 n.6. Using mandamus in this way is "a plain evasion of the provision of the Act of Congress that *final* judgments only should be brought before this Court for re-examination." *Bank of Columbia v. Sweeny*, 26 U.S. 567, 569 (1828) (emphasis in original).

Certiorari is warranted for three reasons: (1) the Eighth Circuit majority panel granted mandamus relief when none of the *Cheney* factors were met; (2) the circuit courts of appeals are split over what standard of review should be applied to determine whether mandamus relief is warranted to review a district court's §1404(a) venue transfer order; and (3) this Court never has directly spoken on the issue of whether mandamus relief should be considered for a denied venue transfer motion.

I. CERTIORARI IS WARRANTED BECAUSE THE EIGHTH CIRCUIT MAJORITY PANEL'S RULING CONFLICTS WITH *CHENEY*

Mandamus relief was inappropriate because: (1) Apple had three other available options for review; (2) the District Court had judicial authority to deny Apple's Motion to Transfer; and (3) a writ is inappropriate under the circumstances—especially given that Apple waited nearly two months to request it. Certiorari is thus warranted because the Eighth Circuit majority panel granted mandamus relief when none of the *Cheney* factors were met. *See* SUP. CT. R. 10(a).

A. THE FIRST *CHENEY* FACTOR WAS NOT MET: APPLE HAD OTHER AVAILABLE OPTIONS, INCLUDING A DIRECT APPEAL, FOR SEEKING REVIEW OF THE DISTRICT COURT'S MOTION TO TRANSFER ORDER.

As discussed in more detail below, a direct appeal of the District Court's order denying Apple's Motion to Transfer is available, so mandamus relief was altogether improper. This case does not involve an inter-circuit venue transfer order for which appellate review might be precluded by 28 U.S.C. § 1294(1). Further, to the extent it preferred immediate review, Apple could have requested reconsideration of the District Court's order or certification to appeal—both of which were expressly authorized either by statute or under the Federal Rules of Civil Procedure.[5]

Without either a final judgment or a 28 U.S.C. § 1292(b) certification, Congress chose to make this interlocutory order non-reviewable. There is no indication that Apple's substantial rights would be affected, and the Eighth Circuit majority panel implicitly conceded that the district court had authority to rule on the § 1404(a) motion.

---

5. For its contention that Apple was not required to seek interlocutory review, the Eighth Circuit majority panel relied on *Caleshu v. Wangelin*, 549 F.2d 93 (8th Cir. 1977), but that case is inapposite because it addressed a district court's failure to act under 28 U.S.C. § 1406(a), not § 1404(a). (Appendix A at 4); *see also* 28 U.S.C. § 1406(a) ("The district court of a district in which is filed a case laying venue in the wrong division or district ***shall*** dismiss, or if it be in the interest of justice, transfer such a case to a district or division in which it could have been brought.") (emphasis added).

The Eighth Circuit majority panel failed to explain either (1) why mandamus was "clearly an appropriate remedy" for this denied § 1404(a) request, or (2) why a direct appeal was unavailable. (*See* Appendix A at 3-4 (stating, "mandamus is clearly an appropriate remedy")). Notwithstanding, whether an appeal of this order may have limited success does not render a direct appeal "unavailable" such to authorize mandamus. *See Bankers Life*, 346 U.S. at 383 ("[E]xtraordinary writs cannot be used as substitutes for appeals, even though hardship may result from delay and perhaps unnecessary trial...") (internal citation omitted); *see also Volkswagen I*, 545 F.3d at 323 (King, J., dissenting) ("That such an appeal may have limited success due to the harmless error rule, FED. R. CIV. P. 61, does not mean-here or anywhere else that I know of-that direct appeal is 'unavailable.'").

These are not "exceptional" circumstances such to classify this decision any differently than other non-reviewable interlocutory orders. The Eighth Circuit majority panel essentially usurped its own authority by permitting Apple to bypass the numerous alternative avenues for review. As the first *Cheney* factor was not met, however, mandamus relief was not justified. *See* 28 U.S.C. § 1651(a); *see also Cheney* 542 U.S. at 380-81.

1. A Direct Appeal Is Available And Not Precluded By 28 U.S.C. § 1294(1).

It is well settled that, when a district court grants a § 1404(a) motion and the case is transferred to ***another*** circuit, appellate review by the transferee circuit court is altogether precluded by statute. 28 U.S.C. § 1294(1)

("appeals from reviewable decisions of the district and territorial courts shall be taken to the courts of appeals ...[f]rom a district court of the United States to the court of appeals for the circuit embracing the district...."); *TEC Floor Corp. v. Wal-Mart Stores, Inc.*, 4 F.3d 599, 602-03 (8th Cir. 1993) (recognizing that it lacked jurisdiction to review a transfer order from another circuit); *Brock v. Entre Computer Ctrs., Inc.*, 933 F.2d 1253, 1257 (4th Cir. 1991) (same); *Moses v. Bus. Card Express, Inc.*, 929 F.2d 1131, 1136 (6th Cir. 1991) (same); *Reyes v. Supervisor of the DEA*, 834 F.2d 1093, 1095 (1st Cir. 1987) (same); *Starnes v. McGuire*, 512 F.2d 918, 924-25 (D.C. Cir. 1974) (en banc) (same); *Illinois Tool Works, Inc. v. Sweetheart Plastics, Inc.*, 436 F.2d 1180, 1188 (7th Cir. 1971) (same).

In such a case, some circuit courts recognize that a party seeking review may "petition the transferor circuit court for a writ of mandamus or, once transferred, move the transferee court to retransfer the case and secure appellate review of its decision in the transferee court." *See, e.g., Roofing & Sheet Metal Servs., Inc. v. La Quinta Motor Inns, Inc.*, 689 F.2d 982, 987-88 (11th Cir. 1982) (stating that "cases involving transfers between circuits are distinguishable from those in which motions to transfer are denied or transfer is ordered within a single circuit; in these cases, unlike those involving inter-circuit transfers, appellate jurisdiction to review the district court's order is preserved on appeal from final judgment"); *TechnoSteel, LLC v. Beers Const. Co.*, 271 F.3d 151, 159 n.7 (4th Cir. 2001); *see also SongByrd, Inc. v. Estate of Grossman*, 206 F.3d 172, 177-78 (2d Cir. 2000) (holding that, in order to appeal a district court's transfer order from a district court sitting outside its circuit, the party must first move to retransfer).

Even when an inter-circuit transfer order is at issue, however, the second and third *Cheney* factors must also be met in order to justify such extraordinary relief. Mandamus relief thus might be considered only in the rare instance where, for example, a party is deprived of a hearing. *See, e.g., Plum Tree, Inc. v. Stockment*, 488 F.2d 754, 756 (3d Cir. 1973) ("the failure to provide notice and an opportunity to be heard to the party opposing transfer was a ***violation of due process and would be remedied by granting a writ of mandamus*** to secure vacation of a transfer order") (emphasis added).

In contrast, for orders not involving an inter-circuit transfer, the circuit courts recognize that a direct appeal is available. *See, e.g., N.Y. Marine & Gen. Ins. Co. v. Lafarge N. Am., Inc.*, 599 F.3d 102, 112-14 (2d Cir. 2010) (reviewing a district court's denial of a motion to transfer on direct appeal); *Astro-Med, Inc. v. Nihon Kohden Am., Inc.*, 591 F.3d 1, 12-13 (1st Cir. 2009) (same); *Broussard v. State Farm Fire & Cas. Co.*, 523 F.3d 618, 631 (5th Cir. 2008) (same); *Zomba Enters., Inc. v. Panorama Records, Inc.*, 491 F.3d 574, 588-89 (6th Cir. 2007) (same).

Notably, even the Eighth Circuit has recognized in *Carr v. Donohoe*[6] the important distinction between ***inter-circuit*** venue transfer orders and all other § 1404(a) orders:

> It seems obvious that the transfer of the petitioners' action against Clarke to the District of Minnesota cannot in any way impair or defeat the jurisdiction of this Court to

6. 201 F.2d 426 (8th Cir. 1953).

> review any appealable order or judgment which eventually may be entered in the case. It is, to our minds, an ordinary controversy between litigants with respect to a question of venue which, before the ultimate determination of the case, will probably cease to be of any substantial consequence. ***We think that this Court, at this stage of the litigation, may not be called upon to rule upon the propriety or legality of the proposed transfer.***

Id. at 428-29 (denying petition for writ of mandamus) (emphasis added); *see also McGraw-Edison Co. v. Van Pelt*, 350 F.2d 361, 364 (8th Cir. 1965) (Oosterhout, J. specially concurring) (stating, "any error in refusing to transfer can be considered by this court upon direct appeal from final judgment").

This case was not transferred to another circuit such that § 1294(1) could act to preclude a direct appeal. Because a direct appeal is clearly available, which, remarkably, the Eighth Circuit itself has recognized, the Eighth Circuit majority panel's consideration of the first *Cheney* factor is thus erroneous; mandamus relief was not warranted. *See* 28 U.S.C. § 1651(a); *see also Cheney*, 542 U.S. at 380-81.

B. THE SECOND *CHENEY* FACTOR WAS NOT MET: APPLE'S RIGHT TO A WRIT IS NOT CLEAR AND INDISPUTABLE.

"[C]lear abuse of discretion" does not involve a district court's possibly erroneous exercise of its

conceded authority; rather, clear abuse of discretion occurs when the district court lacks the judicial power or authority to make the decision that it did. *See Bankers Life*, 346 U.S. at 383. In *De Beers Consolidated Mines*, this Court stated:

> When Congress withholds interlocutory reviews, [the All Writs Act] can, of course, not be availed of to correct a mere error in the exercise of conceded judicial power. But when a court has no judicial power to do what it purports to do-when its action is not mere error but usurpation of power-the situation falls precisely within the allowable use of [the All Writs Act].

325 U.S. at 217.

Thus, for purposes of the second *Cheney* factor, "[w]here a matter is committed to discretion, it cannot be said that a litigant's right to a particular result is clear and indisputable." *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980) (internal quotation marks and citation omitted).

1. The District Court Was Authorized to Deny Apple's Motion.

Section 1404(a) vests a ***district court*** with the authority to transfer a case in its ***discretion***: "For the convenience of parties and witnesses, in the interest of justice, a ***district court may*** transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. §1404(a) (emphasis added); *see also*

Jama v. Immigration & Customs Enforcement, 543 U.S. 335, 346 (2005) ("The word 'may,' customarily connotes discretion."); *Haig v. Agee*, 453 U.S. 280, 294 n.26 (1981). Section 1404(a) is not the mandatory tool to "prevent plaintiffs from abusing their privilege under § 1391"; it is a ***discretionary tool*** to be applied by a district court "[f]or the convenience of parties and witnesses, in the interest of justice." *See Volkswagen I*, 545 F.3d at 321 (King, J., dissenting).

The Eighth Circuit majority panel never challenged the District Court's authority under § 1404(a), nor did it discuss any errors that might implicate the District Court's power to act as it did. (*See generally* Appendix A). Instead, the majority panel concluded that the District Court merely erred in evaluating and weighing the § 1404(a) factors. However, where "an appellate court reviews the district court's analysis of the venue transfer factors and reweighs each factor as it feels appropriate, it is doing nothing less than controlling the district court's decision, and thus enlarging mandamus in the precise fashion that the *Bankers Life* Court warned against." *Volkswagen I*, 545 F.3d at 326 (King, J., dissenting); *see also Bankers Life*, 346 U.S. at 382-83.

The District Court had judicial power to deny Apple's Motion to Transfer. This power was authorized by statute. *See* 28 U.S.C. § 1404(a). Mandamus relief was thus not authorized because the second *Cheney* factor was not met. *See* 28 U.S.C. § 1651(a); *see also Cheney*, 542 U.S. at 380-81.

2. Luxpro's Choice of Forum is Entitled to Deference.

Nothing in § 1391 gives Apple the right to be sued only in the venue where it is headquartered. Apple has sufficient contacts with the Western District of Arkansas, such that it is subject to personal jurisdiction there. Venue is thus appropriate based upon Apple's place of "residence," as that term is defined for purposes of § 1391(c).

Notwithstanding, the Eighth Circuit majority panel went to great lengths to conclude that Luxpro's choice of forum was entitled to "minimal weight" and that "no relevant connection" existed between "the Apple-Luxpro dispute and Western Arkansas." (Appendix A at 5). In so doing, the majority panel cited a Fifth Circuit decision (*In re Horseshoe Entertainment*, 337 F.3d 429 (5th Cir. 2003)) and further consulted *forum non conveniens* case law—even though Apple neither contested venue nor filed a motion to dismiss on that ground. (Appendix A at 5-6). Notably, prior to this case, the Eighth Circuit never held that a foreign plaintiff's choice of forum was entitled to minimal deference in a § 1404(a) analysis,[7] which was a compelling enough reason for the Eighth Circuit majority panel to overrule Apple's mandamus request.

In any event, even though *Terra International, Inc. v. Mississippi Chemical Corp*, 119 F.3d 688, 696 (8th

---

7. Indeed, had Congress intended that a foreign plaintiff's choice of venue be limited to the venue of a domestic defendant's corporate headquarters, then such a provision would have been included in 28 U.S.C. §1391. No such limitation exists.

Cir. 1997), authorized it to accord as much as "considerable deference," the record is devoid of any suggestion that the District Court gave Luxpro's choice of forum anything more than minimal deference. (*See* Appendix B at 2). As such, the record does not support a conclusion that the District Court "clearly abused its discretion." As the second *Cheney* factor was not met, mandamus relief was inappropriate. *See* 28 U.S.C. § 1651(a); *see also Cheney*, 542 U.S. at 380-81.

3. The Record Supports The District Court's Decision To Deny Apple's Motion To Transfer.[8]

As an initial matter, the Eighth Circuit majority panel improperly made several factual findings. For example, it concluded that "Apple would be inconvenienced by sending witnesses to testify in Arkansas rather than in California," and "Luxpro would not face any material inconvenience by litigating in California." (Appendix A at 7-8). Even though Apple presented no evidence to support as much, other than its mere conclusory statements, the Eighth Circuit further "found" that "[m]any potential witnesses reside in California; much of Apple's relevant documentation is located in California; and Northern California is the site of alleged misconduct." (*Id.* at 8). The Eighth Circuit's factual findings, however, are simply improper in any context. *See Maine v. Taylor*, 477 U.S. 131, 145 (1986) (warning that "appellate courts are not to decide

8. It is axiomatic that, because the District Court acted within its judicial authority, the Eighth Circuit majority panel's re-weighing of the §1404(a) factors was improper.

factual questions *de novo*, reversing any findings they would have made differently"). Notably, the Eighth Circuit further concluded that California state law would apply to some of Luxpro's claims, even though the District Court expressly noted that the parties had failed to adequately brief that issue, and without undergoing a sufficient choice-of-law analysis. (Appendix A at 8).

Notwithstanding, Apple's evidence was selective, arbitrary, and objectively failed to carry its burden of proof. Because of this, the District Court, which was in the best position to evaluate the evidence (or lack thereof) and the circumstances of the case, found that California's only relevant connection to the dispute was that Apple was headquartered there. (Appendix B at 4). The District Court further considered both the time to trial and the time to disposition and concluded that they weighed in favor of denial. (Appendix B at 4-5). These findings are supported by the record, and sustain a decision to deny Apple's Motion to Transfer. The Eighth Circuit majority panel's disagreement with the District Court's weighing of the factors does not demonstrate that Apple's right to a writ is clear and indisputable. *See Bankers Life*, 346 U.S. at 383; *see also Cheney*, 542 U.S. at 380-81.

C. THE THIRD *CHENEY* FACTOR WAS NOT MET: MANDAMUS RELIEF IS INAPPROPRIATE.

The Eighth Circuit majority panel failed to undertake any inquiry as to whether mandamus was appropriate. (*See generally* Appendix A at 1-10). If it had, it would have necessarily concluded that mandamus

was not warranted in this case in light of the District Court's careful application of the factors the Eighth Circuit approved of in *Terra International*. Clear abuse of discretion simply cannot be found where, as the Eighth Circuit majority panel suggests, a district court disregards non-binding case law from other circuits. It is further inappropriate for at least the reasons that follow.

By granting mandamus relief when it is not authorized either by this Court's precedent or the All Writs Act, and permitting a petition for mandamus relief to be filed (and granted) at any stage in the litigation—regardless of the availability of other options for review, the majority panel's decision broadens the scope of § 1292 to allow piecemeal appeals of orders Congress has determined are unreviewable.

The Eighth Circuit majority panel's decision further creates a new presumption that a foreign plaintiff's choice of forum is "much less reasonable" than that of a U.S. plaintiff's choice, improperly shifts the burden to the plaintiff to demonstrate why its choice of forum is more convenient, and guarantees that venue transfer decisions will be made by appellate panels, rather than the district court judges who are in the best position to weigh the facts and circumstances.

Beyond this, during its two-month delay, Apple merely "slept on its rights" by failing to move the district court for reconsideration or for certification of an interlocutory appeal. Significantly, Apple would have had just 30 days to seek review of a final judgment, but the majority panel permitted the extraordinary remedy of

mandamus relief after Apple waited nearly twice as long to request it. *See* FED. R. APP. P. 4(a). Apple's delay is the precise type of harm Congress sought to avoid in drafting § 1292.[9]

The Eighth Circuit majority panel's ad hoc decision unquestionably will lead to a lack of uniformity in its own circuit—not to mention an increase in requests for mandamus relief, not unlike what is currently transpiring in the Federal Circuit in the wake of the *Volkswagen I* decision. This is precisely the use against which the *Bankers Life* Court warned. The third *Cheney* factor was not met because extraordinary remedy of mandamus relief simply is inappropriate under the circumstances of this case. *See* 28 U.S.C. § 1651(a); *Cheney* 542 U.S. at 380-81.

II. THE CIRCUIT COURTS OF APPEALS ARE SPLIT OVER THE SCOPE AND STANDARD OF MANDAMUS REVIEW AVAILABLE FOR § 1404(A) VENUE ORDERS.

As discussed, many of the circuits recognize the distinction between inter-circuit transfers and all other § 1404(a) venue orders. *See, e.g.*, *TEC Floor Corp.*, 4 F.3d at 602-03; *Brock*, 933 F.2d at 1257; *Moses*, 929 F.2d at 1136; *Reyes*, 834 F.2d at 1095; *Starnes*, 512 F.2d at 924-25; *Illinois Tool Works*, 436 F.2d at 1188; *Roofing & Sheet Metal*, 689 F.2d at 988. On the other hand, the circuit courts of appeals differ significantly on whether mandamus relief is available to review a § 1404(a) venue

9. The Eighth Circuit majority panel entered its opinion nearly seven months after the district court entered its order.

transfer order that does not involve an inter-circuit transfer and, further, what standard to apply in order to determine as much.

For example, mandamus relief for a § 1404(a) decision is available in the Third Circuit only when the district court lacked the power to enter the order—and then "only if the party seeking the writ meets its burden to demonstrate that its right to a writ is clear and indisputable." *In re Federal-Mogul Global, Inc.*, 300 F.3d 368, 379 (3d Cir. 2002).

Similar to the Eighth Circuit majority panel's decision, the Fifth Circuit deems the first *Cheney* factor "automatically" met when a venue transfer motion is denied. *See Volkswagen I*, 545 F.3d at 319 (stating, "an appeal will provide no remedy for a patently erroneous failure to transfer venue"). To meet the second *Cheney* factor in the Fifth Circuit, a petitioner need not show that the district court clearly abused its discretion or usurped its judicial authority, but only that the district court's weighing of the private and public interest factors was "patently erroneous." *See id.* at 315-18.

A slightly higher standard applies in the Seventh Circuit where mandamus relief is available to review a denied § 1404(a) request, but "only upon a determination that the district court 'so far exceeded the proper bounds of judicial discretion as to be legitimately considered usurpative in character or in violation of a clear and indisputable legal right, or at the very least, patently erroneous' and that the injury caused by the challenged order cannot be repaired by any means other than mandamus, such as by waiting

till the appeal from the final judgment." *In re Nat'l Presto Indus., Inc.*, 347 F.3d 662, 663-65 (7th Cir. 2003) (denying petition for writ of mandamus after stating, "we suspect that the balance favors the Western District[, b]ut the balance is not so far askew as to justify the extraordinary relief sought by Presto").

Mandamus review of an order denying a § 1404(a) transfer is "available" in the Ninth Circuit only "to prevent a grave miscarriage of justice." *Kasey v. Molybdenum Corp. of America*, 408 F.2d 16, 19-20 (9th Cir. 1969). Even then, however, the Ninth Circuit will not reweigh each venue transfer factor, thereby substituting its own discretion for the district court's: "[w]e decline to issue the writ when it appears from a well-reasoned holding by the trial judge that he has considered the issues listed in [§] 1404(a) and has made his decision accordingly." *Id.* at 20.

In any event, while some of the circuit courts of appeals appear to adhere, at least in part, to the principles set forth in *Cheney*, many others, including the Fifth and (now) Eighth Circuits, have disregarded those principles in a blatant usurpation of their own power—resulting in mandamus relief for otherwise non-reviewable, or "ordinary," interlocutory orders. Guidance by this Court is thus necessary to address both the appropriateness of mandamus relief and the correct scope of mandamus review of orders denying §1404(a) venue requests. *See* SUP. CT. R. 10(c).

III. THE SUPREME COURT HAS YET TO DIRECTLY ADDRESS THE LAW CONCERNING THE AVAILABILITY OF MANDAMUS RELIEF FOR DENIED VENUE TRANSFER MOTIONS.

Contrary to the Eighth Circuit majority panel's conclusion, the first *Cheney* factor is not "automatically" met when a venue transfer motion is ***denied*** because a direct appeal of that issue is available after entry of final judgment and is not precluded by § 1294(1). This is true irrespective of whether Apple "could not show that it would have prevailed in a hypothetical trial in Northern California." (Appendix A at 3).

In his dissenting opinion in *La Buy v. Howes Leather Co.*, Justice Brennan explained:

> ***a District Court order denying a transfer would not come under the umbrella of power under the All Writs Act***, since retention of the cause by the District Court can hardly thwart or tend to defeat the power of the Court of Appeals to review that order after final decision of the case.

La Buy, 352 U.S. 249, 264-65 (1957) (Brennan, J., joined by Frankfurter, Burton, & Harlan, JJ., dissenting) (emphasis added).

Notwithstanding, this Court has yet to directly address the suitability of mandamus relief in the context of an otherwise non-reviewable interlocutory order denying a § 1404(a) venue transfer request. As such,

this Court should grant the instant petition for writ of certiorari in order to conclusively settle this important question of federal law. *See* SUP. CT. R. 10(c).

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that this Court grant the petition for a writ of certiorari.

Respectfully submitted,

PATRICK J. CONROY
Counsel of Record
THERESA M. DAWSON
SHORE CHAN BRAGALONE
DEPUMPO LLP
901 Main Street, Ste. 3300
Dallas, Texas 75202
(214) 593-9110
pconroy@shorechan.com

RICHARD A. ADAMS
PHILLIP N. COCKRELL
REID D. MILLER
COREY D. MCGAHA
JEREMY Y. HUTCHINSON
PATTON ROBERTS PLLC
Wells Fargo Plaza
Suite 400
2900 St. Michael Drive
Texarkana, Texas 75503
(903) 334-7000

Attorneys for Petitioner
Luxpro Corporation

APPENDIX

APPENDIX A — EIGHTH CIRCUIT COURT ORDER FILED APRIL 19, 2010

No. 09-3689

On Petition for Writ of Mandamus [PUBLISHED]

In re: Apple, Inc., formerly known as Apple Computer, Inc.,

Petitioner

Submitted: February 19, 2010
Filed: April 19, 2010

Before BYE, MELLOY, and COLLOTON, Circuit Judges.

PER CURIAM.

Apple, Inc., filed a petition for writ of mandamus seeking an order directing the United States District Court for the Western District of Arkansas to transfer this case to the United States District Court for the Northern District of California. We grant the petition.

I.

Luxpro Corporation, a manufacturer and distributor of digital music players, brought suit against Apple in the United States District Court for the Western District of Arkansas ("Western Arkansas"). Luxpro is a Taiwanese corporation with its principal place of

business in Taiwan. Apple is a California corporation with its principal place of business in Cupertino, California, which is in the Northern District of California ("Northern California").

Apple manufactures and distributes digital music players under the well-known iPod brand name. According to Luxpro's complaint, Apple allegedly engaged Luxpro in abusive litigation in Germany and Taiwan. In addition, through threats of litigation and other pressure, Apple allegedly harmed Luxpro's dealings with companies located in the United States, Singapore, Japan, and elsewhere. Apple did so, Luxpro claims, to "prevent an increased market share among the smaller-ranged manufacturers" of digital music players. Luxpro asserts causes of action for interference with contractual/prospective advantage, tortious interference with contracts, attempted common-law monopolization, commercial disparagement, and a violation of California Business and Professions Code Section 17200.

Apple moved, pursuant to 28 U.S.C. § 1404(a), to transfer venue to Northern California. Apple argued that its witnesses were located in California, that witnesses from nonparty companies and from Luxpro would be inconvenienced less by travel to California than to Arkansas, that litigious tactics of which Luxpro complained originated from Apple's California headquarters, that relevant documents were located in California, and that Arkansas had no connection to the dispute. For its part, Luxpro asserted that its choice of

forum was entitled to deference, and that docket statistics showed that it would secure a trial more quickly in Western Arkansas. The district court denied Apple's transfer motion.

II.

A writ of mandamus serves as a "useful safety valve for promptly correcting serious errors," *Mohawk Indus., Inc. v. Carpenter*, 130 S. Ct. 599, 608 (2009) (internal quotation and alteration omitted), but it is an "extraordinary remedy" that is available only to correct a "clear abuse of discretion." *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 380 (2004) (internal quotations omitted); *see Wilkins v. Erickson*, 484 F.2d 969, 971 (8th Cir. 1973) (applying "clear abuse of discretion" standard to an order entered under 28 U.S.C. § 1404(a)). Our precedent recognizes "manifest judicial arbitrariness" as a basis for granting a writ, *McGraw-Edison Co. v. Van Pelt*, 350 F.2d 361, 363 (8th Cir. 1965) (en banc), but this language does not establish a standard that is narrower than the "clear abuse of discretion" standard recognized in *Cheney* and *Wilkins*. As *McGraw-Edison* itself indicates, a clear error of law or clear error of judgment leading to a patently erroneous result may constitute a clear abuse of discretion. *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 312 & n.7 (5th Cir. 2008) (en banc) (citing *McGraw-Edison*, 350 F.2d at 363), *cert. denied*, 129 S. Ct. 1336 (2009); *In re BellSouth Corp.*, 334 F.3d 941, 954 (11th Cir. 2003); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1295 (7th Cir. 1995). Because mandamus is not to replace the usual appellate process,

we will issue a writ only where the aggrieved party has no other adequate means to attain the desired relief. *Cheney*, 542 U.S. at 380-81.

The usual post-judgment appeal process is not an adequate remedy for an improper failure to transfer. If Apple were to appeal from an adverse final judgment rendered in Western Arkansas, it could not show that it would have prevailed in a hypothetical trial in Northern California. *See In re Nat'l Presto Indus., Inc.*, 347 F.3d 662, 663 (7th Cir. 2003). Therefore, we have recognized that the writ of mandamus is proper, albeit extraordinary, relief for an erroneous ruling on a motion to transfer under § 1404(a). *See McGraw-Edison*, 350 F.2d at 363. We will not, however, disturb a district court's transfer order where "the facts and circumstances are rationally capable of providing reasons for what the district court has done." *Id.*; *see In re Volkswagen*, 545 F.3d at 312 n.7.

Luxpro contends that mandamus relief is not warranted, because Apple did not seek reconsideration of the § 1404(a) order or ask the district court to certify the case for interlocutory appeal under 28 U.S.C. § 1292(b). We disagree. Our cases establish that a writ of mandamus is available with respect to a decision under § 1404(a), *Wilkins*, 484 F.2d at 971; *McGraw-Edison*, 350 F.2d at 363, and where mandamus is clearly an appropriate remedy, we are not bound to require that the petitioner first seek interlocutory review. *Caleshu v. Wangelin*, 549 F.2d 93, 96 n.5 (8th Cir. 1977). Thus, even if we assume that interlocutory review would be

available, *cf. In re Horseshoe Entm't*, 337 F.3d 429, 432 (5th Cir. 2003) ("§1292(b) review is inappropriate for challenges to a judge's discretion in granting or denying transfer under § 1404(a)"); *Technitrol, Inc. v. McManus*, 405 F.2d 84, 86 n.2 (8th Cir. 1968) (declining to resolve the issue), we may proceed to consider the petition for writ of mandamus.

Section 1404(a), the transfer-of-venue provision, provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." The statute "was drafted in accordance with the doctrine of forum non conveniens, permitting transfer to a more convenient forum, even though the venue is proper." *Van Dusen v. Barrack*, 376 U.S. 612, 634 n.30 (1964) (quoting Revisor's Note, H.R. Rep. No. 80-308, at A132 (1947), and H.R. Rep. No. 79-2646, at A127 (1946)). "Congress, in passing § 1404(a), was primarily concerned with the problems arising where, despite the propriety of the plaintiff's venue selection, the chosen forum was an inconvenient one." *Id.* at 634.

This action "might have been brought" in Northern California, *see* 28 U.S.C. § 1391(a)(1), and Apple contends that the district court clearly abused its discretion in refusing to transfer the case. We have declined to offer an "exhaustive list of specific factors to consider" in making the transfer decision, *see Terra Int'l, Inc. v. Miss. Chem. Corp.*, 119 F.3d 688, 691 (8th Cir. 1997), but district courts should weigh any "case-specific factors"

relevant to convenience and fairness to determine whether transfer is warranted. *See Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988); *Terra Int'l*, 119 F.3d at 691.

An important issue in this case is the deference owed to Luxpro's choice of forum. In denying Apple's motion, the district court stated that "[i]n general, federal courts give considerable deference to the plaintiff's choice of forum," and ruled that it would "not disregard the deference provided Luxpro because it brought its claim in a forum that was not its residence nor the place where the conduct occurred when a U.S. forum with those two connections does not exist."

This court has said that "[i]n general, federal courts give considerable deference to a plaintiff's choice of forum and thus the party seeking a transfer under section 1404(a) typically bears the burden of proving that a transfer is warranted." *Terra Int'l*, 119 F.3d at 695. This "general" practice of according deference, however, is based on an assumption that the plaintiff's choice will be a convenient one. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255-56 (1981). When the plaintiff, like Luxpro, hails from a foreign nation, that assumption is "much less reasonable," *id.* at 256, and the risk that the plaintiff chose the forum to take advantage of favorable law or to harass the defendant increases. *De Melo v. Lederle Labs.*, 801 F.2d 1058, 1062 n.4 (8th Cir. 1986). Accordingly, a foreign plaintiff's choice of forum "is entitled to substantially less deference." *Id.* We have never said that "a choice of forum supported only by

the fact that it was chosen," *Pac. Car & Foundry Co. v. Pence*, 403 F.2d 949, 955 (9th Cir. 1968), in and of itself, does anything more than shift the burden of proof to a movant seeking transfer under § 1404(a).

Because no relevant connection exists between Luxpro, Apple, potential witnesses, or the dispute and Western Arkansas, Luxpro's choice of forum was entitled to minimal weight in the § 1404(a) determination. *See In re Horseshoe Entm't*, 337 F.3d at 434-35. Neither party maintains its headquarters in Western Arkansas. Neither party identified any witness who resides in Arkansas. And although Apple sells the iPod and its other products there, none of Apple's alleged abusive litigation relates to Western Arkansas. The only connection between this dispute and Western Arkansas is that Luxpro chose to file there and retained local counsel.

Despite no relevant connection between the Apple-Luxpro dispute and Western Arkansas, the district court ruled that transfer to Northern California was not warranted. The district court determined that the "only connection" between the dispute and Northern California is that Apple is "headquartered there." The court also found that "judicial economy" weighed in favor of retaining the matter, because docket statistics showed that, on average, civil cases proceeded faster from filing to trial and from filing to disposition in Western Arkansas than in Northern California.

We first consider the convenience to the parties and witnesses. The district court found that the "only

convenience factor" that definitively favored transfer was the relative ease of travel to Northern California for both parties and some potential nonparty witnesses, but did not weigh this factor heavily because of modern "travel conveniences." Apple asserted that many of its potential witnesses are attorneys who work in the Cupertino, California, headquarters or abroad. Apple also identified several witnesses who are not attorneys, all of whom reside in Northern California. If Apple's California witnesses were required to travel to Arkansas, Apple would likely incur expenses for airfare, meals and lodging, and losses in productivity from time spent away from work. *See In re Volkswagen*, 545 F.3d at 317. In addition, Apple's witnesses will suffer the "personal costs associated with being away from work, family, and community." *Id.* These costs would be significantly minimized or avoided by transfer to Northern California.

Lux-pro identified a number of companies as nonparties with relevant information regarding the allegations. Apple contends that those nonparties would be inconvenienced by litigation in Western Arkansas. Unfortunately, the district court did not determine which of those nonparties likely possessed material information, *see In re Genentech, Inc.*, 566 F.3d 1338, 1343 (Fed. Cir. 2009), but we know that at least one of these companies – Synnex Technology International Corporation – has its principal place of business in

Fremont, California.[1] Luxpro alleges that Synnex, an Apple supplier, "threatened a number of Taiwanese Luxpro distributors." Synnex would be inconvenienced by sending witnesses to testify in Arkansas rather than in California. With respect to the remaining nonparty witnesses located in foreign countries, and Luxpro's witnesses in Taiwan, the two venues are roughly equivalent, for we recognize that persons coming from abroad "will be required to travel a significant distance no matter where they testify." *Id.* at 1344.

The district court found that the location of documents did not favor transfer in "this age of electronic document transmissions." Apple contends, and Luxpro does not seriously dispute, that much of Apple's relevant documentary evidence is located in its Cupertino headquarters. While electronic filing may lessen the inconvenience of document handling, if the need arises to refer to original documents or evidence in the litigation, Northern California would prove more convenient. *See In re Volkswagen*, 545 F.3d at 316. We accord no weight to Luxpro's contention that the vast

---

1. Witnesses from Synnex apparently would be the only nonparties subject to either district's subpoena power. *See* Fed. R. Civ. P. 45(c)(3)(A)(ii) (providing that "the issuing court must quash or modify a subpoena that requires a person who is neither a party nor a party's officer to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person"). The district court concluded that neither district "will be in a better position" to subpoena nonparty witnesses. The ability of Northern California to subpoena Synnex witnesses favors transfer, but only slightly.

majority of its relevant documents are located with its attorneys in Western Arkansas. A plaintiff may not defeat a motion to transfer by shipping relevant documents to local counsel in its chosen venue. *See In re Hoffman-La Roche Inc.*, 587 F.3d 1333, 1336-37 (Fed Cir. 2009).

The district court "agree[d] with Luxpro that no venue is more convenient for the place where the alleged wrongs occurred." Although Apple's alleged misconduct occurred in various countries, according to Luxpro's complaint, one such country is the United States. Luxpro does not dispute Apple's contention that alleged misconduct originated from the Cupertino headquarters, where many of Apple's attorneys with a role in enforcing intellectual property rights are located. Thus, if Apple did carry out a plan to harm Luxpro's business interests, "alleged wrongs" occurred in Northern California, while none of the alleged misconduct occurred in Western Arkansas. This weighs in favor of transfer. *See Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 509 (1947) ("There is a local interest in having localized controversies decided at home."); *In re Volkswagen*, 545 F.3d at 317-18.

In sum, the inconvenience to Apple would be significantly minimized if this case were litigated in Northern California. Luxpro would not face any material inconvenience by litigating in California rather than Arkansas. The district court's conclusion that the "only connection" between Northern California and the dispute is that Apple is "headquartered there"

understates the significance of the point. Many potential witnesses reside in California; much of Apple's relevant documentation is located in California; and Northern California was the site of alleged misconduct. Accordingly, the case-specific factors that the district court considered relative to the convenience of the parties and witnesses weigh strongly in favor of transfer.

We next address factors that the district court considered with regard to the "interest of justice." We do not quarrel with the district court's view that the overall comparative cost of litigation and Luxpro's ability to enforce a judgment in either district do not definitively favor Northern California. Beyond that, the district court ruled that it would not weigh the applicability of each prospective venue's state substantive law, because Apple and Luxpro failed to brief the issue adequately. Whatever the ultimate resolution of the choice-of-law issue, however, there is no dispute that Luxpro pleaded a cause of action predicated on a violation of the California Business and Professions Code. In that respect, at a minimum, the district court must apply California law to evaluate the claim. "There is an appropriateness" in holding trial in a diversity case in the venue that is "at home with the state law that must govern the case." *Gilbert*, 330 U.S. at 509. The only state law weighing on the scales at this stage of the litigation is the California law that must apply to one of Luxpro's causes of action. This factor favors transfer.

The district court also relied on caseload statistics in determining that "judicial economy" weighed against

transfer. The court erroneously believed that statistics showed a shorter time from filing *to disposition* in Western Arkansas; the 2008 caseload data in the record actually show the opposite, with Northern California over two months faster on average. App. Ex. H. Luxpro contends, however, that moving quickly *to trial* in Arkansas is "critical given the significant damage wrought by Apple through illegal conduct," and that the statistics do support a finding that the median time to trial is shorter in Western Arkansas. The data show that the median time from filing of a civil case to the start of trial in Northern California is thirty months (sixty-first among all districts). By contrast, in Western Arkansas, it is sixteen months (eighth among districts). But as the Federal Circuit recently stated, whether one court would move any given case to trial faster is "speculative," because "case-disposition statistics may not always tell the whole story." *In re Genentech*, 566 F.3d at 1347 (compelling transfer from Eastern Texas to Northern California).

Even assuming that the data support a finding that Western Arkansas would move Luxpro's case to trial faster, relative docket congestion cannot override the several factors of convenience and justice that favor transfer. *See id.* ("[W]hen, as here, several relevant factors weigh in favor of transfer and others are neutral, then the speed of the transferee district court should not alone outweigh all of those other factors."). Docket congestion is a permissible factor to consider in deciding a § 1404(a) motion, *see Terra Int'l*, 119 F.3d at 696, but it is not "by itself, a dispositive factor." *P & S Bus.*

Machs., Inc. v. Canon USA, Inc., 331 F.3d 804, 808 (11th Cir. 2003). The interests of justice are not served when a district with a relatively swift docket becomes a "willing repository" for cases that have no connection to it. *Original Creatine Patent Co. v. Met-Rx USA, Inc.*, 387 F. Supp. 2d 564, 572 (E.D. Va. 2005).

The convenience of the parties and witnesses, and the relevant interests of justice, favor transfer of this case from the Western District of Arkansas to the Northern District of California. The district court, however, essentially treated as dispositive Luxpro's choice of a forum with no connection to the lawsuit, bolstered only by statistics concerning median time from filing to trial in Western Arkansas. In our view, this was a clear abuse of discretion.

For the foregoing reasons, we grant Apple's petition for writ of mandamus and direct that the district court transfer this action to the Northern District of California.

Judge Bye would deny the petition for writ of mandamus.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF ARKANSAS, TEXARKANA DIVISION DATED SEPTEMBER 28, 2009

CASE NO. 08-CV-4092

LUXPRO CORPORATION,
a Taiwanese corporation

PLAINTIFF

v.

APPLE, INC., f/k/a Apple Computer, Inc.

DEFENDANT

ORDER

Before the Court is a Motion to Transfer filed by Defendant Apple, Inc. ("Apple"). (Doc.25). Plaintiff Luxpro Corporation ("Luxpro") responded. (Doc. 33). Apple replied. (Doc. 38). The Court finds this matter ripe for consideration.

Plaintiff Luxpro is a small Taiwanese corporation with its principle place of business in Taiwan. Luxpro develops, manufactures, and distributes MP3 players worldwide. Defendant Apple is a California corporation with its principle place of business in Cupertino, California, which is in the Northern District of California. Apple manufactures, develops, and distributes MP3 players worldwide under the brand name iPod.

Appendix B

Luxpro filed this suit on October 14, 2008 claiming that Apple: 1) interfered with its contractual/prospective advantage; 2) tortiously interfered with its contracts; 3) committed an attempted common law monopolization; 4) committed commercial disparagement; and 5) violated California Business and Professions Code section 17200. The conduct at issue in this case occurred in various countries around the world. Consequently, the potential witnesses offered by the parties are located in many different countries around the world.

"For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. § 1404(a). The Court is not limited to only these three factors in determining whether a transfer is proper; instead, the Court must "weigh in the balance a number of case-specific factors." *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22, 28, 108 S.Ct. 2239, 2244 (1988). The Court must consider the convenience of the parties, the convenience of the witnesses, the interest of justice, and all other relevant factors regarding the transfer. *See Terra Intern., Inc. v. MississippiChemical Corp.*, 119 F.3d 688, 691 (8th Cir. 1997). In general, federal courts give considerable deference to the plaintiff's choice of forum, and thus, the party seeking transfer typically bears the burden of proving that the transfer is warranted under 28 U.S.C. section 1404(a). *Id.*

Under section 1404 the Court, when balancing the conveniences, may consider such things as: 1) the convenience of the parties; 2) the convenience of the

witnesses—including the willingness of the witnesses to appear; 3) the accessibility to records and documents; 4) the location where the conduct complained of occurred; and 5) the applicability of each forum state's substantive law. *Terra*, 119 F.3d at 691. Shifting the inconvenience from one party to the other is not justifiable for a change of venue. *R & R Packaging, Inc. v. GAP Roofing, Inc.*, 2007 WL 162730, *3 (W.D. Ark. 2007). The Court may also consider the following when determining what is in the interest of justice under section 1404: 1) judicial economy; 2) the plaintiff's choice of forum; 3) the comparative costs to the parties of litigating in each forum; 4) each party's ability to enforce a judgment; 5) obstacles to a fair trial; 6) conflict of law issues; and 7) the advantages of having a local court determine questions of local law. *Terra*, 119 F.3d at 691.

As an initial matter, the Court must determine whether Luxpro could have brought this suit in the Northern District of California. 28 U.S.C. § 1404(a). Because Apple is headquartered there, Luxpro could have filed this case in the Northern District of California. 28 U.S.C. § 1400(b). The Court now must weigh the convenience and interest of justice factors along with any other factor or circumstance that may be relevant to determine if a transfer is warranted. *Terra*, 119 F.3d at 691.

Apple first argues that Luxpro's choice of forum should be afforded no deference because it does not reside in the chosen forum and there are no connections to the chosen forum. The Court disagrees. The Court recognizes that some district courts do not afford the

usual deference to the plaintiff's choice of forum when the plaintiff does not reside in that forum. *Thornton Drilling Co. v. Stephens Production Co.*, 2006 WL 2583659 *2 (E.D. Ark. 2006)(holding that transfer was warranted to district where conduct in dispute occurred and where a majority of witnesses were located); *Biometics, LLC v. New Womyn, Inc.*, 112 F. Supp. 2d 869, 877 (E.D. Mo. 2000)(holding transfer to district where conduct in dispute occurred was warranted). However, the Court finds that the facts here are distinguishable from *Thornton* and *Biometics* where the plaintiffs were both domestic corporations which were residents of districts other than the one where they chose to bring suits. Here we have a foreign corporation with its residence in Taiwan, conduct that occurred outside of the United States, and witnesses around the world. The Court will not disregard the deference provided Luxpro because it brought its claim in a forum that was not its residence nor the place where the conduct occurred when a U.S. forum with those two connections does not exist.

Next, Apple argues that as a foreign plaintiff, Luxpro should have filed in a district with some connection to the dispute. *Amazin' Raisins Intern., Inc. v. Ocean Spray Cranberries, Inc.*, 2004 WL 2595896 *5. Apple also argues that Luxpro is forum shopping. The Court has the discretion to take into account, on a case-by-case basis, any factors or circumstances that may be relevant. *Terra*, 119 F.3d at 691. The Court reiterates that no state has connections of the type in *Amazin' Raisins*. 2004 WL 2595896 *5 (in this patent infringement case, there was a district in which a

manufacturing plant was located and a district closest to the patent inventor, but the Canadian plaintiff chose a district with no connections instead). The Court finds it relevant that the only connection to California is that Apple is headquartered there. Therefore, Luxpro did not choose the Western District of Arkansas in spite of the existence of a district with substantial connections to the dispute. This, along with the absence of clear evidence to the contrary, leads the Court to find that Luxpro was not forum shopping.

Next, Apple argues that the balance of conveniences favors a transfer. Luxpro disagrees and argues no convenient forum exist for the place the conduct in dispute occurred. The Court agrees that the Northern District of California would be more convenient to travel to for the parties and some of the nonparty witnesses. However, the Court is not convinced that the ability to subpoena or the location of documents favors the Northern District of California. The majority of witnesses in this case seem to be international; thus, neither court will be in a better position to subpoena nonparty witnesses. Additionally, in this age of electronic document transmissions, the Court finds that the location of documents will not provide an inconvenience to either party. Furthermore, the Court agrees with Luxpro that no venue is more convenient for the place where the alleged wrongs occurred.[1]

1. The Court will not consider Apple's argument that because California law applies to Luxpro's claims, this factor should weigh in favor of transfer. The Court recently noted in

(Cont'd)

Apple also contends that the interest of justice favors transfer to the Northern District of California. Luxpro disagrees and argues that its choice of forum is entitled to deference and because the median time-to-trial is shorter in the Western District of Arkansas the Court should not transfer this case. The Court recognizes that the median time-to-trial in the Northern District of California is more than double that of the Western District of Arkansas, and the median time-to-disposition is also longer. [2] The Court finds that this factor of judicial economy weighs in favor of retaining this matter. Furthermore, the Court is not convinced that the comparative cost of trial definitively favors the Northern District of California. Moreover, the Court does not find that Apple's arguments regarding additional cost to Luxpro to enforce a judgment weigh in favor of transfer. Luxpro chose this forum with the knowledge that if it were successful on its claims it would then have to enforce them in California.

The Court has considered all arguments presented regarding the transfer of this case and finds that Apple has not met its burden of proving that a transfer is

---

(Cont'd)

its Memorandum Opinion on Apple's Motion to Dismiss that the parties had not adequately briefed the choice-of-law issue and the Court will not make arguments for the parties. This situation has not changed. Therefore, the Court is unable to consider this factor here.

2. www.uscourts.gov/cgi-bin/cmsd2008.pl (last visited September 24, 2009).

warranted here. Apple has shown the Court that the only convenience factor that definitively favors the Northern District of California is that it would be easier for the parties and some of the nonparty witnesses to travel to San Francisco, California rather than Texarkana, Arkansas. In this modern day of travel conveniences, this alone does not convince the Court that a transfer is warranted for convenience purposes. Additionally, there is nothing here that indicates that the interest of justice cannot properly be served in the Western District of Arkansas. Therefore, Apple's Motion to Transfer is **DENIED**.

IT IS SO ORDERED, this 28th day of September, 2009.

/s/ Harry F. Barnes
Hon. Harry F. Barnes
United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DATED JUNE 30, 2010

No: 09-3689

In re: Apple, Inc., formerly known as Apple Computer, Inc.

Petitioner

Appeal from U.S. District Court for the Western District of Arkansas - Texarkana (4:08-cv-04092-HFB)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Kermit E. Bye would grant the petition for rehearing en banc. Judge Bobby E. Shepherd took no part in the consideration or decision of this matter.

June 30, 2010

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans